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No. 807

IN THE

Supreme Court of the United States

SHERMAN H. SKOLNICK,

Petitioner,

vs.

CHARLES T. MARTIN; and ARTHUR LILLY; and CHARLES K. PERRIGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS and/or THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

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INDEX

	PAGE
Opinions Below	1
Documents and Papers transmitted with Petition	2
Jurisdiction	2
Questions Presented	4
Constitutional and Statutory Provisions Involved	7
Statement of the Case	8
Reasons for granting the Writ	13
Appendix:	
A—Order of Transfer	27-28
B—Order denying Stay of Mandate	29-30

CITATIONS

Cases

American Railway Express Co. v. Levee, 263 U.S. 19, 21, 44 S. Ct. 11, 13	16
Carter v. Texas, 177 U.S. 442, 447, 44 L.Ed. 839, 841, 20 S. Ct. 687	20
Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U.S. 561, 580-581, 50 L.Ed. 596, 604, 26 S. Ct. 341	18
Chicago Bar Association v. Kellogg, 401 Ill. 375, 380, 381, 82 N.E. 2d 639	24
Chicago Life Ins. Co. v. Needles, 113 U.S. 574, 28 L.Ed. 1084, 1086, 5 S. Ct. 681	21

PAGE

City of Chicago v. Campbell, 27 Ill. App. 2d 456, 460, 170 N.E. 2d 19 13

City of Detroit v. Gould, 12 Ill. 2d 297, 299, 304, 146 N.E. 2d 61 25

Compass Sales Corp. v. National Mineral Co., 388 Ill. 281, 284, 57 N.E. 2d 888 ..... 13, 22

Davis v. Wechsler, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L. Ed. 143 17

Deerfield Park District v. Progress Development Corp., 22 Ill. 2d 132, 137, 174 N.E. 2d 850 25

De La Cour v. De La Cour, 363 Ill. 545, 548, 2 N.E. 2d 896 ..... 3, 24

Dube v. Allman, 396 Ill. 470, 476, 72 N.E. 2d 180 23

Fiske v. State of Kansas, 274 U.S. 380, 385, 47 S. Ct. 655, 656, 71 L.Ed. 1108 19

Gomillion v. Lightfoot, 364 U.S. 339, 347, 81 S. Ct. 125, 130 19

Groome v. Freyn Engineering Co., 374 Ill. 113, 117, 28 N.E. 2d 274 22

Guttman v. Estate of Guttman, 28 Ill. App. 2d 85, 87, 170 N.E. 2d 40 13

Hillsborough Township v. Cromwell, 326 U.S. 620, 625, 66 S. Ct. 445, 449, 90 L.Ed. 358 22

Howard v. Lawton, 22 Ill. 2d 331, 333, 334, 175 N.E. 2d 556 26

Karas v. Snell, 11 Ill. 2d 233, 236, 142 N.E. 2d 46 25

Mandrake v. Schlaeger, 393 Ill. 610, 612, 615, 66 N.E. 2d 858 23

PAGE

Marbury v. Madison, 1 Cranch (U.S.) 137, 177, 2 L. Ed. 60, 73 21

Marino v. Ragen, 332 U.S. 561, 564, 565, 568, 68 S. Ct. 240, 242, 243, 244, 92 L.Ed. 170 ..... 13, 14, 22

Markus v. Virekeos, 14 Ill. App. 2d 1, 3, 142 N.E. 2d 808 13

Maupin v. Maupin, 403 Ill. 316, 318, 319, 320, 86 N.E. 2d 206 24

McCoy v. Shaw, 277 U.S. 302, 303, 48 S. Ct. 519, 72 L. Ed. 891 21

Missouri ex rel. Carey v. Andriano, 138 U.S. 497, 34 L.Ed. 1012, 1014, 11 S. Ct. 385 19

Monroe v. Pape, 365 U.S. 167, 174, 183, 81 S. Ct. 473, 477, 482 16

Moore v. Moyle, 399 Ill. 230, 231, 232, 77 N.E. 2d 651 23

Parker v. People of State of Illinois, 333 U.S. 571, 575, 68 S. Ct. 708, 710, 92 L. Ed. 886 15

People v. Billow, 377 Ill. 236, 239, 36 N.E. 2d 339 3

People of State of New York v. Zimmerman, 278 U.S. 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184 20

Reidelberger v. Bi-State Development, 8 Ill. 2d 121, 124, 133 N.E. 2d 272 25

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L.Ed. 897 17

Rogers v. Alabama, 192 U.S. 226, 230, 48 L.Ed. 418-419, 24 S. Ct. 257 4

Shaw v. Shaw, 397 Ill. 118, 119, 120, 73 N.E. 2d 422 23

Teren v. City of Chicago, 413 Ill. 141, 145, 108 N.E. 2d 476 24

PAGE

Terminiello v. City of Chicago, 337 U.S. 1, 3, 6, 69 S. Ct. 894, 895, 897, 93 L.Ed. 1131 ..... 18, 20, 21

Turzinski v. Pam, 392 Ill. 471, 473, 64 N.E. 2d 726 23

222 East Chestnut St. Corp. v. Berger, 3 Ill. 2d 32, 34, 119 N.E. 2d 757 25

Williams v. Bruffy, 102 U.S. 248, 26 L.Ed. 135, 137, 138 ..... 4, 15

Williams v. State of Georgia, 349 U.S. 375, 383, 75 S. Ct. 814, 819, 99 L.Ed. 1161 19

Young v. Ragen, 337 U.S. 235, 238, 69 S. Ct. 1073, 1074, 93 L.Ed. 1333 13

References

56 Yale Law Journal 574, at page 580 footnote 29 18

Constitution

United States Constitution, Fourteenth Amendment, Section 1 ..... 5, 7, 14

Statutes

Illinois Civil Practice Act, Chap. 110, Section 48(1)(c), Ill. Rev. Stat. (1961), page 1235 ..... 5, 6, 7, 18, 20, 21

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No.

SHERMAN H. SKOLNICK,

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CHARLES T. MARTIN; and ARTHUR LILLY; and CHARLES R. PERRIGO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS and/or THE APPELLATE COURT OF THE STATE OF ILLINOIS, FIRST DISTRICT.

The Petitioner, Sherman H. Skolnick, prays that a Writ of Certiorari be issued to review the final judgment as a form of decision of the Illinois Supreme Court, entered in the above entitled case on November 13, 1962. Petitioner wishes to explain that he believes it necessary to use the words *and/or* in the heading of this Petition because of unusual circumstances which are set forth in this Petition.

OPINION BELOW.

No opinion was rendered by the Illinois Supreme Court. No reason was given.

DOCUMENTS AND PAPERS TRANSMITTED WITH PETITION.

1. Certified copy of Order of Illinois Supreme Court entered on November 13, 1962, transferring petitioner's appeal to the Illinois Appellate Court (First District). (Appendix A, *infra* pp. 27-28).

2. Certified copy of Order of Illinois Supreme Court denying petitioner's Motion for Stay of Mandate of Transfer of the Appeal, pending determination of this Petition for Writ of Certiorari in the Supreme Court of the United States. (Appendix B, *infra;* pp. 29-30).

3. Certified copy of Abstract of Record with nine additional copies.

4. Certified copy of Brief with nine additional copies. No Brief was filed by respondents.

5. Certified copy of Motion filed by respondents to transfer appeal to Appellate Court of Illinois, First District.

6. Certified copy of Objections and Counter-Suggestions of Petitioner to Motion of Respondents to Transfer appeal.

7. Certified copy of petitioner's Motion in the Illinois Supreme Court to Stay Mandate of Transfer of petitioner's appeal pending determination in the Supreme Court of the United States.

JURISDICTION.

The final judgment of the Supreme Court of the State of Illinois in the form of an Order of involuntary Transfer, transferring the Appeal to the Illinois Appellate Court (First District), was entered on November 13, 1962 (Appendix A, *infra* pp. 27-28). The petitioner filed a Motion

in the Illinois Supreme Court on November 24, 1962, for a Stay of Mandate of Transfer pending the determination by the Supreme Court of the United States of petitioner's Petition for Writ of Certiorari. Motion for Stay of Mandate of Transfer, was denied November 27, 1962. According to the precedent in *De La Cour* v. *De La Cour*, 363 Ill. 545, 548, 2 N.E. 2d 896, petitioner declined to docket the Appeal in the Illinois Appellate Court (First District):

> "No question, however, other than the constitutional objection is presented for decision. *Under these circumstances no useful purpose can be served by transferring the cause to the Appellate Court.*" (363 Ill. 545, at 548. (Emphasis added.)

> "The rule has long been settled that if a case is taken to the Appellate Court and errors are assigned of which that court has jurisdiction, the party taking the appeal or suing out the writ of error is deemed to have waived all constitutional questions involved. (Citing authorities.) *This eliminates from consideration the constitutional questions* * * *." The *People* v. *Billow*, 377 Ill. 226, 239, 36 N.E. 2d 339. (Emphasis. (Emphasis added.)

Under Illinois practice the Order of involuntary Transfer to the Illinois Appellate Court removes and obliterates the state and federal constitutional questions. The Order of involuntary Transfer was confirmed and made final by the denial of Stay of Mandate of Transfer, precluding and barring further consideration in Illinois of the petitioner's state and federal constitutional questions. There was left therefore no further appellate remedy under the laws of the State of Illinois.

> "Whenever the highest court of a State, *by any form of decision*, affirms or denies the validity of a judgment of an inferior court, over which it by law can exercise appellate authority, the jurisdiction of this court to review such decision, if it involve a federal

question, will, upon a proper proceedings, attach. *It cannot make any difference* whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or supersedeas, or by dismissing a writ previously allowed." *Williams* v. *Bruffy*, 102 US 248, 26 L. Ed. 135, 137-138. (Emphasis added.)

"It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined *when it is plain that the fair result of a decision is to deny the rights.*" *Rogers* v. *Alabama*, 192 US 226, 230, 48 L. Ed. 417, 418-419, 24 S. Ct. 257. (Emphasis added.)

The petitioner therefore invokes the jurisdiction of this Court under 28 U.S.C.A. Section 1257(3).

QUESTIONS PRESENTED.

1. Whether under Illinois practice Federal constitutional questions specially set up and claimed by petitioner can be removed and obliterated by an Order of involuntary Transfer to the Illinois Appellate Court. And whether the silence of the Illinois Supreme Court on the Federal constitutional questions has the same effect as if the Federal constitutional rights, privileges, and immunities raised and asserted by petitioner had been expressly denied by the Illinois Supreme Court.

2. Whether the form of decision being a judgment of the Illinois Supreme Court declining to entertain a constitutional claim, is in effect an avoidance of a federal right and an evasion of a federal constitutional question specially set up or claimed.

3. Whether the Illinois Supreme Court's silence on the federal question is therefore a failure to recognize federal rights, privileges, and immunities. And whether the

decision of the case on some form of local practice necessarily has the same effect as if the claim of federal rights, privileges, and immunities, had been expressly denied.

4. Whether the application of the provisions of Section 48(1)(c) of the Civil Practice Act of Illinois, Ill. Rev. Stat. (1961) Chap. 110, Sec. 48(1)(c), page 1235:

(a) to dismiss a state tort action because of the pendency in the Federal Court of a Civil Rights case supplementary to that state tort action,

(b) to penalize a plaintiff in a state tort action because he filed in the Federal court a Civil Rights case supplementary to the state tort action, is therefore, repugnant to the Constitution and laws of the United States and contrary to decisions of the Supreme Court of the United States.

5. Whether the judgment of the Illinois Supreme Court by being a form of decision or device to avoid Federal constitutional questions, therefore contravenes the Due Process and the Equal Protection of the Laws guaranteed by Section 1, Fourteenth Amendment to the Constitution of the United States? And also contravening Section 1, Fourteenth Amendment, by precluding, in practice, a state tort action because of the pendency in the Federal court of a Civil Rights case supplementary to that state tort action.

6. Whether a litigant need prosecute a constitutional claim to a non-constitutional state court in order to have a finality of judgment necessary to an application to the Supreme Court of the United States for a Writ of Certiorari. And whether the involuntary transfer to such non-consfitutional state court is thereby an obstacle to the assertion and vindication of Federal constitutional rights, privileges, and immunities.

7. Whether the Constitution and laws of the United States and any precedent decisions of the Supreme Court of the United States contemplate a paradox where the petitioner must exhaust a state remedy which obliterates Federal constitutional questions, in order to assure review in the Supreme Court of the United States of the express denial by a state court of petitioner's Federal rights, privileges, and immunities.

8. Whether petitioner, after such involuntary transfer of appeal, by declining to docket his appeal in the Illinois Appellate Court, has thereby preserved the Federal constitutional questions so that the Supreme Court of the United States can determine for itself whether petitioner's Federal rights, privileges, and immunities had been expressly denied by the Illinois Supreme Court. And whether the Supreme Court of the United States is not concluded by the view taken by the highest court of the State of Illinois in regard to those Federal rights.

9. Whether a state statute of general scope by being applied and enforced against a particular transaction where there was a distinct and timely insistence that the statute thus applied was repugnant to the Federal constitution and laws—whether such statute is therefore unconstitutional and void.

10. Whether the application of Section 48(1)(c), Chap. 110, Ill. Rev. Stat. (1961), to penalize petitioner for filing his Civil Rights case in the Federal court supplementary to his state tort action, therefore impairs the authority of the federal government.

11. Whether the Illinois Supreme Court in effect has expressly denied the petitioner's Federal constitutional questions and therefore impairs the authority of the federal government.

12. Whether the Illinois Supreme Court in effect impairs the authority of the federal government by expressly giving to the Federal constitution and Federal laws a construction adverse to such authority.

13. Whether an Order of Involuntary Transfer to the Illinois Appellate Court can be used, under color of law or under color of state practice, as an instrument of state power to deprive petitioner of Federal constitutional rights, privileges, and immunities.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

A.) Amendment XIV to the Constitution of the United States, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

B.) Illinois Civil Practice Act, Chap. 110, Section 48(1)(c), Ill. Rev. Stat. 1961, page 1235 provides:

> "48. Involuntary dismissal based upon certain defects or defenses.
>
> "(1) Defendant may (within the time for pleading, file a motion for dismissal of the action or for other appropriate relief upon any of the following grounds. If the grounds do not appear on the face of the pleading attacked the motion shall be supported by affidavit: * * *
>
> "(c) That there is another action pending between the same parties for the same cause."

STATEMENT OF THE CASE.

On January 7, 1960, the respondents procured an Order of Court in the Circuit Court of Cook County, Case No. 58 C 7219, for petitioner's appearance at 2 p.m., on the same day, in the office enclosure of respondent, Charles T. Martin, for the taking of petitioner's discovery deposition on oral interrogatories. Petitioner's request for a protective Order for his safety, with the minimum requirement of giving his deposition in a neutral place, was resisted by the respondents and denied by the Court. (Abst. 2; Rec. 4).

The petitioner, a polio victim since 1936 at the age of 6, and a paraplegic with a scoliosis spinal condition, had 16 major operations up to 1945. Within his chest frame and cage petitioner has a series of artificial muscles made up of thigh facia, seriously restricting petitioner's sitting continuously for more than 45 minutes. Since 1937 until the deposition events on January 7, 1960, petitioner was an ambulatory on braces and crutches, suffering from flaccid paralysis of both lower extremities, and paralysis of the anterior abdominal muscles, and scoliosis of the dorsal and lumbar spines, all from polio. (Abst. 1-2; Rec. 3). His condition of debility and incapacity was visible and known to the respondents. (Abst. 2; Rec. 4).

Under the guise and pretext of Discovery Deposition Process, armed with a Court Order, the respondents wrongfully, illegally, wantonly, intentionally and maliciously, contrived and combined to subject the petitioner to an ordeal of torment, intimidation, oppression, torture, harm and injury and to inflict upon the petitioner pain, mental

anguish and distress, by committing or causing, allowing, consenting and approving to be committed the following overt acts (Abst. 3; Rec. 4-5):

(a) Directed and forced the petitioner to sit from 2 p.m. to 6:20 p.m., in a low back, narrow chair with no arm rests of an adequate height, disregarding and ignoring his protests. (Abst. 3; Rec. 5).

(b) Took and kept away from petitioner his crutches which he needed for support and protection. (Abst. 4; Rec. 5).

(c) Directed and forced petitioner's father to sit at a distance, away from the petitioner, preventing the needed attention from his father to lift petitioner's legs, rearrange his position and move and reposition the petitioner as his father does when petitioner sits down. (Abst. 4; Rec. 5).

(d) The respondent, Charles T. Martin, was standing over the petitioner and screaming down at him, ignoring petitioner's protestations. (Abst. 4; Rec. 5).

(e) The respondent Charles T. Martin, hovering over the petitioner, wrenched an envelope from him, removed the contents and flung the envelope back at the petitioner. (Abst. 4; Rec. 5).

(f) Kept the petitioner sitting for four hours and twenty minutes in such low back, narrow chair with no arm rests of an adequate height, thereby causing the petitioner to suffer great spinal pressure because of no back or arm support, which caused a caved in back effect on scoliosis spine of petitioner; severe hanging leg pressures; great impinging pressure at hip bone sockets because of lack of back support on account of petitioner's leg braces extending up to the hips; thigh pains; pulling down of weight of braces with the hip end of braces pushing up; and caused fulcrum pressures like on see-saw, all of which were known or made known to the respondents. (Abst. 4; Rec. 5-6).

(g) During the taking of petitioner's discovery deposition, the respondents operated a secret recording device concealed in another room under their manipulation and control, without informing the petitioner or his attorney, either before or during the taking of the deposition, and without stating for the record their design and purpose. Such secret recording was carried on while respondents' own court-reporter was taking down petitioner's deposition stenographically. (Abst. 4-5; Rec. 6).

After the above described ordeal, the petitioner collapsed, becoming delirious and was transported to his home suffering constant pain in his back. He was forced to stay in bed for a period of two weeks, and ever since, the petitioner cannot ambulate with his crutches as theretofore, necessitating the use of a wheel chair. As a consequence of such an ordeal the petitioner has also suffered attacks of dyspnea and has become completely paralyzed. (Abst. 5; Rec. 6).

The respondents filed a motion to dismiss alleging as their sole ground that the pendency of petitioner's action in the Federal Court against the respondents, filed on the same day, January 4th, 1962, is a bar to petitioner's action in the State Court. (Abst. 6, 7-12, 15; Rec. 16, 19-24, 35).

Objections with Counter-Affidavit were filed by petitioner, to strike or deny respondents' motion to dismiss. (Abst. 12-15; Rec. 29-31).

Under date of March 13, 1962, a letter, on the letterhead of the attorneys of record for respondent, Charles T. Martin, was addressed to the "Honorable Daniel A. Covelli, Room 911, County Building, Chicago, Illinois", the judge of the trial Court, without serving a copy on petitioner's attorney. This letter was signed by the respondent, Charles T. Martin, a lawyer, member of an honorable profession. It contained, *inter alia*, respondent Martin's self-serving assertions, declarations and conclusions of

matters outside the record, including a libelous statement against the petitioner. (Abst. 16-17; Rec. 46).

On March 28, 1962, the trial Court sustained respondents' motion and dismissed petitioner's suit at his costs. In addition, the Court denied petitioner's motion to file an amended Complaint. (Abst. 16; Rec. 44).

Petitioner appealed to Illinois Supreme Court praying that said Orders of the trial Court be reversed with directions to deny respondents' motion to dismiss the petitioner's suit and to rule on respondents to answer the Complaint on the merits, or, in the alternative, to allow petitioner's motion to file an amended Complaint. (Abst. 17; Rec. 49).

On November 13, 1962, the Illinois Supreme Court entered an Order of Transfer, transferring the Appeal to the Illinois Appellate Court (First District) to which petitioner objected. (Certified copy of petitioner's Objections and Counter-Suggestions to Respondents' Motion to Transfer Appeal.)

On November 24, 1962, the petitioner filed a Motion in the Illinois Supreme Court for a Stay of Mandate of Transfer pending the determination by the Supreme Court of the United States of petitioner's Petition for Writ of Certiorari. (Appendix B, *infra*; pp. 29-30).

Motion for Stay of Mandate of Transfer was denied November 27, 1962. (Appendix B, *infra*, pp. 29-30).

Petitioner declined to docket the Appeal in the Illinois Appellate Court (First District).

Federal Constitutional questions were alleged, raised and asserted in petitioner's pleadings in the state trial court. (Abst. 3, pars. 7, 8; Rec. 4, 5; Abst. 13-14, pars. 1 to 6; Rec. 29-30).

Federal Constitutional questions are inherent in the judgment order of the state trial court dismissing petitioner's cause of action. It reads (Abst. 16; Rec. 44):

Order of Court entered March 28, 1962:

> "This cause coming on to be heard on motion of the defendants, Arthur Lilly and Charles R. Perrigo by their attorney B. F. Martin, and defendant Charles Martin, to dismiss the above captioned law suit for the reason that there is presently pending in the United States District Court for the Northern District of Illinois, Eastern Division, another action pending between the same parties, with the same alignment of parties, for the same alleged cause. The Court being fully advised in the premises and having jurisdiction of the subject matter and of the parties; It is hereby ordered that the motion of the defendants is hereby sustained and this suit is dismissed at plaintiff's costs. It is further ordered that plaintiff's motion to file an amended complaint is hereby denied."

Federal Constitutional questions are raised and asserted in petitioner's Brief filed in the Illinois Supreme Court. (Certified copy of Brief, under Plaintiff's Theory, pp. 2-3, pars. 1-6; and under Jurisdictional Grounds, pp. 4-5, pars. 1, 2, 4, 7; under Points and Authorities, pp. 6-8; and under Argument, pp. 13-17, Points I, I-A, I-B, I-C; and in the Conclusion, p. 18.)

And Federal Constitutional questions are alleged, raised and asserted in petitioner's Objections and Counter-Suggestions in opposition to the Motion of respondents to transfer the appeal, in paragraphs 1, 5, 6, 7, 8, 9. Paragraph 8 states:

> "A transfer of plaintiff's appeal to the Appellate Court would constitute another denial of Due Process of Law, since under Illinois Practice the Appellate Court has no power to consider and pass on the constitutional questions raised, asserted in the Court below and inherent in the Orders appealed from, showing denial to the plaintiff of Due Process of Law and of basic constitutional rights." (Abst. 13-14; Rec. 29-30). (See, Certified copy of Objections and Counter-Suggestions transmitted with Petition.)

REASONS FOR GRANTING THE WRIT.

I.

Under Illinois practice an appeal to the Illinois Appellate Court automatically eliminates and obliterates the constitutional questions. "The transfer of this cause from the Supreme Court *removed* the constitutional question from the appeal." *Guttman* v. *Estate of Guttman*, 28 Ill. App. 2d 85, 87, 170 N.E. 2d 40 (1960). (Emphasis added.)

> "* * * *The constitution neither established this court nor conferred upon it jurisdiction over appeals.*" *Marlas* v. *Perkeos*, 14 Ill. App. 2d 1, 3, 142 N.E. 2d 808 (1957). (Emphasis added.)

It is self-evident therefore that a constitutional claim, state or federal, cannot be sent to the Illinois Appellate Court without obliterating such constitutional claim.

> "The issues argued on appeal * * * with added emphasis on the constitutional question. *The Appellate Court cannot consider the latter.*" *City of Chicago* v. *Campbell*, 27 Ill. App. 2d 456, 460, 170 N.E. 2d 19 (1960) (Emphasis added.)

An appeal to the Illinois Appellate Court obliterates the state and federal constitutional questions under any circumstances. "If any constitutional question was involved . . . *if* it was argued and decided there it was waived by an appeal to the Appellate Court * * *." *Compass Sales Corp.* v. *National Mineral Co.*, 388 Ill. 281, 284, 57 N.E. 2d 888 (1944). (Emphasis added.)

As was said in *Marino* v. *Ragen*, 332 U.S. 561, 564:

> "This rule, requiring exhaustion of state remedies as a condition precedent to federal relief, has been firmly established by repeated decisions of this Court.

> * * * *But it has always been clear that the rule may be applied only on the asumption that an adequate state remedy is actually available.* (Citing authorities.) And it would be nothing less than abdication of our constitutional duty and functions to rebuff petitioners with this mechanical formula whenever it may become clear that the alleged state remedy is nothing but a procedural morass offering no substantial hope of relief. Experience has convinced me this is true of Illinois." (Emphasis added.)

The denial of Stay of Mandate of Transfer has the finality necessary to the review by this Court of the Federal Constitutional questions specially set up and claimed by petitioner, because it is "* * * a situation already so muddled that only one rational conclusion may be drawn. It is that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one." (*Marino* v. *Ragen*, 332 US 561, 567.)

"The exhaustion-of-state-remedies rule should not be stretched to * * * absurdity." (*Marino* v. *Ragen*, 332 US 561, 568.)

Petitioner's appeal, having nothing but federal and state constitutional questions, sent to the Illinois Appellate Court, would be more than exhausting an inadequate remedy—it would be fatal to the petitioner's claim of Federal constitutional rights, privileges, and immunities, and of Due Process and the Equal Protection of the Laws, guaranteed by Section 1, of the Fourteenth Amendment to the Constitution of the United States.

But petitioner believes he has taken the right road to the United States Supreme Court.

> "The channel through which the constitutional questions, raised by petitioner * * * could have been taken all the way to this Court was not only clearly marked, it was also open and unobstructed." *Parker* v. *People of State of Illinois*, 333 U.S. 571, 575, 68 S. Ct. 708, 710, 92 L. Ed. 886.

> "But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." *Young* v. *Ragen*, 337 U.S. 235, 238, 69 S. Ct. 1073, 1074, 93 L. Ed. 1333. (Emphasis in the opinion itself.)

Petitioner has declined to docket his Appeal in the Illinois Appellate Court (First District) although the Illinois Supreme Court has denied the Stay of Mandate of Transfer to the Illinois Appellate Court (First District) (Appendix B, *infra* pp. 29-30). This unusual circumstance necessitates that this petition for writ of certiorari mention the Illinois Supreme Court and/or The Illinois Appellate Court (First District).

II.

> "No doctrine of this court rests upon more solid foundations, or is more fully valued and cherished, than that which sustains its appellate power over State Courts where the Constitution, laws, and treaties of the United States are drawn in question, and their authority is *denied or evaded*, or where any right is asserted under a state law or authority in conflict with them." *Williams* v. *Bruffy*, 102 U.S. 248, 26 L. Ed. 135, 137. (Emphasis added.)

As this Court said in *Monroe* v. *Pape*:

> "Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the *state remedy*, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. 167, 183, 81 S. Ct. 473, 482. (Emphasis added.)

The very reasons why it was necessary for Congress almost a hundred years ago to pass Civil Rights legislation is clear in the following language from *Monroe* v. *Pape*:

> "The third aim was to provide a federal remedy *where the state remedy*, though adequate in theory, *was not available in practice*." 365 U.S. 167, 174. (Emphasis added.)

A hundred years later it is not available in practice in Illinois and even more, the Illinois Supreme Court affirms in silence the penalizing of the petitioner because he had filed a Federal court Civil Rights case supplementary to his state tort action.

A litigant, particularly one who has filed a state tort action and a Federal court Civil Rights case supplementary to that state tort action—such a litigant should be able to insist that "The law of the United States *cannot be evaded by the forms of local practice*." *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 21, 44 S. Ct. 11, 13. (Emphasis added.). Or can the implications of this Court's decision in *Monroe* v. *Pape* regarding "supplementary to the state remedy" be likewise evaded?

If a state court can thereby, in the name of local practice, penalize a litigant because he has both a state tort action *and* a Federal court Civil Rights case supplementary to that state tort action—then there is presented a significant Federal constitutional question and

> "'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true *where the issues involved reach constitutional dimensions*, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues *unless avoidance becomes evasion.*" *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S. Ct. 614, 616, 99 L. Ed. 897 (Emphasis added.)
>
> "Whatever *springes* the State may set for those who are endeavoring to assert rights that the State confers, *the assertion of Federal rights*, when plainly and reasonably made, *is not to be defeated under the name of local practice.* * * * If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right *or to bar the assertion of it* even upon local grounds. (Citing authority.) This is familiar as to the substantive law and for the same reasons *it is necessary to see that local practice shall not be allowed to put unreasonably obstacles in the way.*" *Davis* v. *Wechsler*, 263 U.S. 22, 24-25, 44 S. Ct. 13, 14, 68 L. Ed. 143. (Emphasis added.)

Regarding another phase of evasive state court devices, it has been said,

> "* * * the Supreme Court appears to laymen as a final arbiter in most cases, but in the few as an adjudicator whose power can be avoided through legal trickery. See Frankfurter, Distribution of Judicial Power Between United States and State Courts (1928)

Corn, L. Q. 499, 503." (*State Court Evasion of United States Supreme Court Mandates*, 56 Yale Law Journal 574, at page 580 footnote 29.) (1947). It is applicable here.

> * * but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. And such plainly was the effect of the judgment in this case. * * * And that result could not be avoided merely by *silence on the Federal question* * * * The claim of a Federal right or immunity specially set up from the outset *went to the very root of the case and dominated every part of it.* * * * Therefore a failure to recognize such Federal right or immunity * * * *necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied.*" *Chicago, B. & Q. R. Co.* v. *Illinois ex rel. Grimwood*, 200 U.S. 561, 580-581; 50 L. Ed. 596, 604, 26 S. Ct. 341. (Emphasis added.)

> "*But he maintained at all times* that the ordinance as applied to his conduct *violated his right* * * * under the Federal constitution * * *." *Terminiello* v. *City of Chicago*, 337 US 1, 3, 69 S. Ct. 894, 895, 93 L. Ed. 1131. (Emphasis added.)

The petitioner maintained at all times that his Federal court Civil Rights case is supplementary to his state tort action. The petitioner maintained at all times that the state court could not apply Section 48(1)(c), Chap. 110, Ill. Rev. Stat. (1961), to dismiss petitioner's state tort action just because petitioner also had a Federal court Civil Rights case supplementary to that state tort action.

> "A decision of a State court applying and enforcing a State statute of general scope against a particular transaction as to which *there was a distinct and timely insistence that if so applied, the statute*

was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied * * *. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. (Citing authorities.)" *Fiske* v. *State of Kansas*, 274 US 380, 385, 47 S. Ct. 655, 656, 71 L. Ed. 1108. (Emphasis added.)

"If a state court can thus penalize a litigant because he filed a Federal court Civil Rights case supplementary to his state tort action, then there is an important Federal constitutional question as yet unresolved as to whether or not the United States Supreme Court can "* * * prevent the courts of the several States from *impairing or frittering away* the authority of the federal government, by giving a construction to its statutes adverse to such authority." *Missouri ex rel. Cavey* v. *Andriano*, 138 US 497, 34 L. Ed. 1012, 1014, 11 S. Ct. 385. (Emphasis added.)

"* * * we are not precluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. (Citing authorities in footnote 7.) *A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim* while passing upon kindred issues raised in the same manner." *Williams* v. *State of Georgia*, 349 US 375, 383, 75 S. Ct. 814, 819, 99 L. Ed. 1161. (Emphasis added.)

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over *when state power is used as an instrument for circumventing a federally protected right.*" *Gomillion* v. *Lightfoot*, 364 US 339, 347, 81 S. Ct. 125, 130. (Emphasis added.)

III.

"There are various ways in which the validity of a state statute may be drawn in question on the ground that it is *repugnant* to the Constitution of the United

States. No particular form of words or phrases is essential, but only that the claim of invaljdity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *People of State of New York* v. *Zimmerman*, 278 US 63, 67, 49 S. Ct. 61, 63, 73 L. Ed. 184. (Emphasis added.)

and the Court continues,

"Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary *effect* of the judgment has been to deny the claim, *that is enough.*" 278 US 63, 67. (Emphasis added.)

"But the question whether a right or privilege, claimed under the Constitution or laws of the United States, was *distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a Federal question*, in the decision of which this court * * * is not concluded by the view taken by the highest court of the state." *Carter* v. *Texas*, 177 US 442, 447, 44 L. Ed. 839, 841, 20 S. Ct. 687. (Emphasis added.)

"We would, therefore, strain at technicalities to conclude that the constitutionality of the ordinance as construed and applied to petitioner was not before the *Illinois courts*. The record makes clear that petitioner at all times challenged the constitutionality of the ordinance as construed and applied to him." *Terminiello* v. *City of Chicago*, 337 US 1, 6, 69 S. Ct. 894, 897, 93 L. Ed 1131. (Emphasis added.)

The petitioner's claim that Section 48(1)(c) Chap. 110 Ill. Rev. Stat. (1961), is repugnant to the Constitution and the laws of the United States, cannot be avoided by the Illinois Supreme Court's Order of involuntary Transfer

"* * * that may be regarded as essentially arbitrary or a mere *device* to prevent the review of a decision upon the federal question." *McCoy* v. *Shaw*, 277 US 302, 303, 48 S. Ct. 519, 72 L. Ed. 891. (Emphasis added.) It is quite clear that "The pinch of the statute is in its application. It is that question which the petitioner has brought here." *Terminiello* v. *City of Chicago*, 337 US 1, 6.

> "* * * to [if the statute(s) * * * are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below." *Chicago Life Ins. Co.* v. *Needles*, 113 US 574, 28 L. Ed. 1084, 1086, 5 S. Ct. 681.

As was pointed out in *Marbury* v. *Madison* long ago,

> "If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem * * * an absurdity too gross to be insisted on. * * * It is emphatically the province and *duty* of the judicial department *to say what the law is.*" 1 Cranch (U.S.) 137, 177, 2 L. Ed. 60, 73. (Emphasis added.)

It is self-evident that a state statute repugnant to the Federal Constitution must be struck down. The Illinois Supreme Court in silence affirmed with an Order of involuntary Transfer the validity of the statute, 48(1)(c), which the petitioner drew specifically in question. The Illinois Appellate Court, being a non-constitutional court, could not decide one way or the other on the validity of the statute. The petitioner declined to docket his appeal

there. And the statute, void and repugnant, remains standing, as a penalty upon any litigant who files a Federal court Civil Rights case supplementary to his state tort action.

IV.

The Illinois Supreme Court decisions regarding the presenting and handling of Federal constitutional questions are so inconsistent "that only an oracle could point out the proper procedural road." *Marino* v. *Ragen*, 332 US 561, 568. Under Illinois *civil* practice in particular the Illinois Supreme Court decisions regarding Federal questions resemble each other only in the respect that they are the many faces of a paradox. A search fails to indicate a case which resolves these Federal constitutional questions and problems, particularly in regard to the *civil* phase of Illinois practice. "In any event, *there is such uncertainty concerning the* * * * *remedy* as to make it speculative * * * whether the State affords full protection to the *federal rights.*" *Hillsborough Township* v. *Cromwell*, 326 US 620, 625, 66 S. Ct. 445, 449, 90 L. Ed. 358. (Emphasis added.)

Examples:

"The question * * * *involves a consideration and construction of the constitution of the United States*, which gives us jurisdiction * * *." *Groome* v. *Freyn Engineering Co.*, 374 Ill. 113, 117, 28 N.E. 2d 274 (1940). (Emphasis added.)

"Where it is contended * * * that if the court construes a statute in a certain manner it would render it unconstitutional, the question is one of the proper *construction* of the statute and not the question of its *validity.*" *Compass Sales Corp.* v. *National Mineral Co.*, 388 Ill. 281, 284, 57 N.E. 2d 888 (1944). (Emphasis added.)

"This is a direct appeal from a judgment of the superior court of Cook County. Jurisdiction on direct appeal is asserted because it is alleged that a *consti-*

tutional question is involved." *Turzinski* v. *Pam*, 392 Ill. 471, 64 N.E. 2d 726 (1946). (Emphasis added.) Yet the court says, "* * * the cause is transferred to the Appellate Court * * *." 392 Ill. 471, 473.

"It is further alleged that this also constitutes a denial to plaintiffs of the equal protection of the laws, *in violation of the fourteenth amendment to the constitution of the United States.*" *Mandsake* v. *Schlaeger*, 393 Ill. 610, 612, 66 N.E. 2d 858 (1946). (Emphasis added.) Yet the court says, "The case involves no question which gives this court jurisdiction on direct appeal. * * * The cause is transferred to the Appellate Court * * *." 393 Ill. 610, 615.

"Appellants' contention is that the ordinance as applied to the facts violates rights protected by the State and *Federal* constitutions * * *. There being no jurisdicton, the cause is transferred to the Appellate Court * * *." *Dube* v. *Allman*, 396 Ill. 470, 476, 72 N.E. 2d 180. (1947). (Emphasis added.)

"Appellant contends that by such action the trial court has * * * *violated* * * * *the constitution of the United States* * * *." *Shaw* v. *Shaw*, 397 Ill. 118, 119, 73 N.E. 2d 422 (1947). (Emphasis added.) Yet the court says, "Such issues do not present a question of construction of the Federal constitution such as gives this court jurisdiction on direct appeal. The cause is transferred to the Appellate Court * * *." 397 Ill. 118, 120.

"* * * appellant filed a motion to set aside the order * * * alleging that the order * * * had denied her both due process and equal protection of the law, as guaranteed by both the *Federal* and State constitutions * * *. It is * * * contended that this court has jurisdiction on direct review because a construction of the *Federal* and State constitutions is involved." *Moore* v. *Moyle*, 399 Ill. 230, 231, 77 N.E. 2d 651 (1948). (Emphasis added.) Yet the court says, "The issue is rather

the correctness or incorrectness of the order and judgment of the trial court. Of this we have no jurisdiction on direct appeal. The cause is therefore transferred to the Appellate Court * * *." 399 Ill. 230, 232.

"Appellant asserts the action of the trial court deprives him of his constitutional rights, specifically in violation of * * * the fifth and fourteenth amendments of the *constitution of the United States* * * *. He does not seriously argue this position." *The Chicago Bar Association* v. *Kellogg*, 401 Ill. 375, 380, 82 N.E. 2d 639 (1948). (Emphasis added.) Yet the court says, "Where it is claimed that the enforcement of the judgment or decree will deprive one against whom it is rendered of some constitutional right, no constitutional question is involved, because it only questions the *validity* of the judgment or decree. * * * the cause will be transferred to the Appellate Court * * *." 401 Ill. 375, 381. (Emphasis added.)

The litigant "* * * prosecutes a direct appeal to this court upon the theory that the due-process clauses of the State and *Federal* constitutions are involved." *Maupin* v. *Maupin*, 403 Ill. 316, 318, 86 N.E. 2d 206 (1949). (Emphasis added.) But the court says, "The question in such a case is merely the *validity* of the judgment or decree, and not a constitutional question." 403 Ill. 316, 319. (Emphasis added.) and then the court says, "The cause is transferred to the Appellate Court * * *." 403 Ill. 316, 320. (Emphasis added.)

"It is required that when a case is wrongly appealed to this court, it shall be the duty of this court to transfer the appeal to the Appellate Court. (Citing Ill. Rev. Statutes.) *No question, however, other than the constitutional objection is presented for decision.* Under such circumstances *no useful purpose* could be served by *transferring* such a cause to the Appellate Court, and a dismissal may properly be had. (Citing *De La Cour* v. *De La Cour*, 363 Ill. 545.) Accordingly, this appeal is dismissed." *Teren* v. *City of Chicago*, 413

Ill. 141, 145, 108 N.E. 2d 476 (1952). (Emphasis added.)

"The effect of the Illinois law is to deny such a right * * *. A conflict is thus created between *Federal* and State law * * *. This is sufficient to confer jurisdiction over the appeal." *222 East Chestnut St. Corp.* v. *Berger*, 3 Ill. 2d 32, 34, 119 N.E. 2d 757 (1954). (Emphasis added.)

"* * * the law is clear that in absence of constitutional or statutory provisions limiting jurisdiction to Federal courts, State courts have authority to enforce rights under the constitution or statutes of the *United States.*" *Reidelberger* v. *Bi-State Development*, 8 Ill. 2d 121, 124, 133 N.E. 2d 272 (1956). (Emphasis added.)

"It is established that a decision sustaining the constitutionality of a statute is not decisive of its validity against subsequent attacks upon different grounds, where the court has not heretofore considered and passed upon the specific constitutional questions presented." *Karas* v. *Snell*, 11 Ill. 2d 233, 236, 142 N.E. 2d 46 (1957).

"A construction of the *Federal constitutional provision* was therefore in issue in the order of dismissal entered in the trial court. It is from that order of dismissal that this appeal is now taken." *The City of Detroit* v. *Gould*, 12 Ill. 2d 297, 299, 146 N.E. 2d 61 (1957). (Emphasis added.) The court then says, "This cause comes to this court upon a *constitutional question* * * *. The order of the circuit court of Cook County is, therefore, *reversed* and the cause is remanded to that court with directions to proceed in conformity with this opinion." 12 Ill. 2d 297, 304. (Emphasis added.)

"It is also well settled that State power cannot be used as an instrument *to deprive any person of a right protected by the Federal constitution.* (Citing authorities.)" *Deerfield Park District* v. *Progress Development Corp.*, 22 Ill. 2d 132, 137, 174 N.E. 2d 850 (1961). (Emphasis added.)

"Defendants question our jurisdiction on direct appeal. They contend that plaintiff(s) did not properly raise the issue of violation of the due-process and equal-protection clauses of the *Federal* and State constitutions." *Howard* v. *Lawton*, 22 Ill. 2d 331, 333, 175 N.E. 2d 556 (1961). (Emphasis added.) And the court says, 'If the whole record discloses, as here, that there is a fairly debatable question * * * it is proper for the court to consider and pass upon its validity when that issue has been raised in the complaint. We are of the opinion that direct appeal lies to this court on constitutional grounds * * *." 22 Ill. 2d 331, 334.

In more recent years the Illinois Supreme Court has entered an Order of involuntary Transfer in silence, removing and obliterating the Federal constitutional questions without a hearing, without an opinion, without a reason—eliminating the Federal constitutional questions even *sua sponte* on occasion.

CONCLUSION.

For the reasons above stated it is respectfully submitted that the Petition for a writ of certiorari be granted.

Respectfully submitted,

PETER S. SARELAS,
30 No. La Salle Street,
Chicago 2, Illinois,
Central 6-1442,
Attorney for Petitioner.

APPENDIX A.

UNITED STATES OF AMERICA

STATE OF ILLINOIS / SUPREME COURT } ss.

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* twelfth *day of* November *in the year of our Lord, one thousand nine hundred and* sixty-two, *within and for the State of Illinois*:

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE JOSEPH E. DAILY — JUSTICE WALTER V. SCHAEFER
JUSTICE HARRY B. HERSHEY — JUSTICE RAY I. KLINGBIEL
JUSTICE BYRON O. HOUSE — JUSTICE ROBERT C. UNDERWOOD
WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

BE IT REMEMBERED, that, to-wit: on the 13th day of November, A.D. 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

SHERMAN H. SKOLNICK, *Appellant*,		
No. 37383 vs.		Appeal from Superior Court Cook County 62 S 204
CHARLES T. MARTIN; ARTHUR LILLY AND CHARLES R. PERRIGO, *Appellees*		

And now, on this day, the Court having diligently examined and inspected the record and proceedings aforesaid as well as the briefs and argument filed herein, together with the motion by appellees; and now being fully advised in the premises is of the opinion, find, and adjudge that this case was wrongfully appealed to this Court.

THEREFORE, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court for the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

And it is further ordered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 4th day of December, A.D. 1962.

Mrs. Earle Benjamin Searcy

Clerk,

Supreme Court of the State of Illinois

APPENDIX B.

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* twelfth *day of* November *in the year of our Lord, one thousand nine hundred and* sixty-two, *within and for the State of Illinois.*

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE JOSEPH E. DAILY — JUSTICE WALTER V. SCHAEFER
JUSTICE HARRY B. HERSHEY — JUSTICE RAY I. KLINGBIEL
JUSTICE BYRON O. HOUSE — JUSTICE ROBERT C. UNDERWOOD
WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: MRS. EARLE BENJAMIN SEARCY, CLERK

BE IT REMEMBERED, that, to-wit: on the 27th day of November, A.D. 1962, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

SHERMAN H. SKOLNICK, *Appellant*
No. 37383 vs.
CHARLES T. MARTIN, ARTHUR LILLY AND CHARLES R. PERRIGO, *Appellees*

Appeal from Superior Court Cook County 62 S 204

And now, on this day, the Court having duly considered the motion by appellant for stay of mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States, and being now fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant for stay of mandate pending disposition of petition for writ of certiorari in the Supreme Court of the United States be, and the same is, denied.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Courtcof the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of an order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hergunto subscribed my name and affixed the Seal of said Court this 4th day of February, A.D. 1963.

Mrs. Earle Benjamin Searcy
Clerk,
Supreme Court of the State of Illinois.